D. D. Shelby, Jr.

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Case and Comment

NOTES OF

RECENT IMPORTANT, INTERESTING DECISIONS

INDEX TO ANNOTATION OF THE LAWYERS' REPORTS, ANNOTATED

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CASE AND COMMENT

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David D. Shelby.

In selecting the man for appointment to the new circuit judgeship in the fifth circuit of the United States circuit courts, under the Act of Congress of January 25, 1899, President McKinley chose one whose high reputation had been made almost entirely as a practising lawyer. He appointed David D. Shelby, of Huntsville, Ala.

Judge Shelby is a native of Alabama, but his father belonged to the prominent Shelby family of Kentucky, while his mother was a Miss Bouldin, of a Virginia family. He studied law in Cumberland University, Lebanon, Tenn. He was admitted to practice in the Supreme Court of the United States in 1881. He was elected to the state senate of Alabama in 1882, but aside from that had never held any office until he was appointed to his present position on the bench of the United States circuit court and circuit court of appeals. The recommendations for his appointment were remarkably strong. Among those who joined in making them were the Alabama legislature, which was in session when he was appointed, the United States senators from Alabama, the Alabama members of the House of Representatives, the United States senators from Tennessee, and members of the bench and bar of Alabama, Mississippi, and the fifth judicial circuit of the Federal courts, of which he was made a judge. These furnish strong reason for supposing that there is something more than the partiality of friendship to support an opinion written by a prominent lawyer of his own state, that "he has in a more harmonious combination than any lawyer I have ever known the four cardinal virtues of a great judge: ability, integrity, industry, and courtesy." If Judge Shelby fulfils the expectations of those that know him, he will certainly make an exceptionally satisfactory record on the bench.

Contesting Incontestable Policies.

Interest in the question discussed in the February "Case and Comment" respecting the restrictions of public policy upon the incontestability of life insurance is renewed by the recent decision of the privy council, affirming the decision of the supreme court of Canada in the case of Manufacturers' Life Ins. Co. v. Anctil, 28 Can. S. C. 103. This case entirely excludes wager policies from the benefit of the incontestable clause on the ground of public policy. This constitutes a very striking application of the familiar rule that public policy may override express agreements. As the note in 42 L. R. A. 247, shows, the authorities on the subject in this country leave the question of the extent to which the feature of incontestability may be carried subject to some uncertainty. For that reason the decision of the privy council may be deemed especially important.

Carrying One's Own Goods as Interstate Commerce.

As it takes two to make a trade, commerce seems to involve something more than trans-

actions of a person with his own property. Transportation is commerce when it is part of a commercial transaction. But a person's transportation of his own goods from place to place does not seem to have in it any commercial elements. This question is sharply presented in the recent South Carolina case of State *v.* Holleyman, in which the court first decided that intoxicating liquors which a man had bought in another state and was taking home with him in a private vehicle became subject to the laws of his own state as soon as he crossed the boundary. But on rehearing the court decided that until he reached home he was still engaged in interstate commerce and the liquors were not subject to the state law. Several judges dissent. The dissenting opinion of Jones, J., contends that transportation is included in interstate commerce only when it is a commercial transportation, pursuant to an interstate shipment to be delivered at the end of the transportation. Unless a man is engaged in commerce when drawing his own hay upon his farm or driving it along a highway to his barn it can hardly be interstate commerce for him to cross the state boundary carrying some of his own property, whether that may be the watch in his pocket that he bought five years before, or a jug of whiskey that he bought five hours before.

"John Marshall" Day.

A centennial celebration of Chief Justice Marshall's accession to the bench of the Supreme Court of the United States has been proposed by Mr. Adolph Moses, of Chicago, to the Illinois Bar Association, which unanimously approved it and instructed its delegates to present it to the American Bar Association at its meeting in Buffalo, N. Y., during the present month. The proposition does not involve the adoption of a new annual holiday, but only the setting apart of a single day for such a centennial celebration.

The plan suggested is to have a suspension of the business of all courts and to have meetings, appropriately addressed, in the chambers of the United States Supreme Court and in the halls of Congress, as well as in many other places. It also includes addresses by members of the bar in the public schools throughout the land.

The value of such a celebration, fitly held, would be great. School boys who have hardly heard the name of John Marshall would get for the first time some conception of his true place in American history. To many of them it would open a view of the life and growth of our constitutional government that would greatly quicken their interest in its development and in the men who have made it what it is. The boy who learns to appreciate John Marshall's career as much as he does that of a naval or military hero will have taken a long step toward becoming a good citizen.

Chairman's Refusal to Put Motion.

The power of a presiding officer of a parliamentary body to thwart the will of the majority is considered in the somewhat novel case of State, *ex rel.* Southy, *v.* Lashar (Conn.) 44 L. R. A. 197. Here the mayor of a city presiding in a meeting of the board of public works declined to entertain a certain motion, whereupon one of the members of the board took it upon himself to put the motion, and, upon its receiving a majority of the votes, declared it carried. The contention was made that the presiding officer of any deliberative board or assembly is the servant of the body over which he presides, and not its master, and, if he attempts to dominate the assembly or to thwart its will, then any member may act in his place. But the court, without denying the correctness of this as an abstract proposition, did not consider that it was raised in the case, and said that, if it was, it was analogous to the right of revolution. It was held that in declining to entertain the motion and sustaining a point of order against it the mayor was acting within the lines of his duty and powers as a presiding officer, and that, if he was in error, the remedy was not for another member to put the motion, but to appeal to the house from the decision, which, if a majority were against it, would be thereby overruled. The question which the court declined to decide would have been substantially presented if, on taking an appeal from the decision, the presiding officer had refused to put the question of sustaining his decision to vote. Whether such a refusal, which would cut off the last remedy of the aggrieved members, would justify one of them in putting the motion or not, remains undecided.

Ordinance Assigning Limits for Houses of Ill Fame.

An ordinance authorizing houses of prostitution to be maintained within a certain quarter of a city, and extending the limits of that

section to include a locality occupied by private residences, which had hitherto been free from disreputable houses, seems to be as great an outrage as could well be perpetrated on a family there residing. But an ordinance of this kind is held, in L'Hote *v.* New Orleans (La.) 44 L. R. A. 90, to be a valid exercise of the police power where the residence in question had always been near the infected quarter, and its limits, though extended on that side, were as a whole diminished and not enlarged by the ordinance. As to the effect of the ordinance to deprive the citizen of property by depreciating the value of his residence, the court says: "We can readily appreciate there might be an arbitrary exercise of this power that would warrant an appeal to the courts." Yet, after stating the facts of the case, and implying that the property had not been greatly damaged by the change, the court puts its decision on the broad ground that, whatever the extent of the damage, it is *damnum absque injuria*, because it results from a lawful exercise of the police power. The peculiarity of this is that the ordinance damages the citizen, not by prohibiting or restricting, but by permitting, the maintenance of such unlawful houses. It is a strange exercise of the police power to cause damage by legalizing or impliedly permitting an indictable nuisance. It is indeed said that the ordinance is restrictive, but, whatever the form of language, its effect is to permit such houses to be carried on within the limits specified, where except for such permission their maintenance would be a misdemeanor. Therefore, where the ordinance extends those limits so as to permit such unlawful houses to be maintained near the dwelling of a citizen, where they had been previously prohibited, it is a case in which the alleged police power is exercised to do damage to innocent persons by allowing the commission of a common-law offense.

Public Purpose of Parks.

The proper range of municipal power in respect to private necessities, conveniences, and benefits for the inhabitants of a city is one of the living questions of the day. Municipal ownership of gas plants, waterworks, parks, street railways, and various other things is rapidly entering into popular discussion. In its final analysis this is a question not of abstract principle so much as of practical wisdom or expediency, to be determined with reference to the operation of the conflicting motives and movements of human activity. The city ownership of a public park has become so much a matter of course that it does not seem to be thought anomalous. But the question whether or not such a park comes within an exemption from taxation of "public property used for public purposes" was recently decided in Owensboro *v.* Com. (Ky.) 44 L. R. A. 202. The court said that the park in question was a public one, maintained at public expense, not for profit, but for the public good, and that it was open to rich and poor alike. It was declared essential to the public health that cities have and maintain parks where people can breathe wholesome air, and on this ground the park was held to be "public property used for public purposes."

The value of such a park to the people of a city is by no means limited to the matter of health, and the right of the city to purchase and maintain such parks rests on a broader foundation than that of the mere protection of health. If this is not true, many cities have far exceeded their powers in this respect, as much less expensive parks would answer all purposes of health. How far cities may go in providing for the comfort and pleasure of their inhabitants is a question that is likely to be far more warmly discussed hereafter than it has been heretofore. On its purely legal side the question, of course, depends upon constitutional and statutory provisions, but the question how far a city may wisely go in this direction, if permitted, involves a very large question as to the true aim and scope of government. The theory that it has no right to go beyond the public defense and the prevention of crimes and aggressions by individuals toward other persons is advanced by extreme individualists, but such a theory is quite out of harmony with the system which provides large and beautiful parks for the comfort and pleasure of the people.

Estoppel of State.

The doctrine that a state may be estopped by laches, which the courts have somewhat timidly adopted, has been usually limited to transactions relating to private business in which the state occupies substantially the same relation as if it were a private party. Yet it has been applied to preclude the state from exercising its governmental power to forfeit the franchise of a corporation, as, for instance, in the case of State, *ex rel.* Mylrea,

v. Janesville Water Power Co. (Wis.) 32 L. R. A. 391. It is there declared in such a case that, "while time does not run against the state, time together with other elements may make up a species of fraud, and estop even sovereignty from exercising its legal rights."

But even as between the state and one of its own subdivisions, such as a county or a city, the state has been held estopped to deny the legality of the municipal organization. One such case is that of State, *ex rel.* West, v. Des Moines (Iowa) 31 L. R. A. 186, in which the state was held estopped to deny the validity of a statute annexing to a city certain other municipal corporations after the annexation had been accepted, acted upon, and acquiesced in for more than four years. Another such case is People, *ex rel.* Attorney General, v. Alturas County (Id.) 44 L. R. A. 122, in which the state is held to be estopped to deny that an illegally organized county had become a legal subdivision of the state after it had been recognized as such for four years by each of the co-ordinate branches of the state government. These decisions are based on estoppel, and this is clearly held to be an estoppel demanded by public policy. The real basis of the decisions is the fact that great inconvenience, confusion, and damage would result to the people interested by holding that all the public acts of the county or city for a period of years were void. The county or city, being a mere creature of the state, has no right to complain of anything the state may do with it. But when its overthrow after years of *de facto* existence would cause any inconvenience and damage to many people, and throw the transactions of both local and state governments into confusion, the demands of public policy in favor of upholding the municipality are very great. The estoppel in such a case is not in favor of the city or county as such, but of the people. It is an estoppel of the sovereign in favor of the subject on a purely public matter.

Is Picketing Necessarily Illegal?

Fairness and good sense are conspicuous in the opinion of Judge Holdom, of Chicago, in the case of Winslow Bros. Co. v. Building Trades Council, in which he refused to grant an injunction against the ordering of a strike or against picketing by strikers, but did grant one against any intimidation by the use of pickets or otherwise. He rebuked very gently but effectively the attempt to make it appear that courts, especially Federal courts, are partial toward capital as against labor; and he seems to have convinced the defendants that in his case at least that charge against the judiciary was not true. Judge Holdom made it quite clear that he wished to uphold to the fullest extent the right of men to contract for themselves, that this right extended to employers and employees, rich and poor, alike, that men on either side had the right to combine among themselves, but not to coerce others, and that as a judge he would not interfere with the action of labor unions in declaring a strike or in carrying it on so long as they did not resort to intimidation or coercion of others.

The picketing which the court refuses to enjoin in this case is "that picketing which is simply the keeping watch by workingmen belonging to these lodges, or associations, or unions, of others so that they may know what is going on, what is being done." But the judge nevertheless cites with approval some decisions which hold picketing unlawful. One of them was Beck v. Railway Teamsters Protective Union (Mich.) 42 L. R. A. 407, in which the court in an exceptionally elaborate opinion declares that picketing to intercept teamsters and persons going to trade is "in itself an act of intimidation and an unwarrantable interference with the right of free trade," and says also: "It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce." Another case is that of Vegelahn v. Guntner, 167 Mass. 92, 35 L. R. A. 722, where a patrol of strikers was held to be unlawful and an injunction against it was issued without expressly limiting it to a case of intimidation. Judge Holmes in his dissenting opinion says the majority opinion seems to turn on the assumption that the patrol necessarily carries with it a threat of bodily harm, but he deems this assumption unwarranted. In both these cases the proof was perhaps sufficient to show that the picketing was in fact intended as intimidation. But in the absence of any such proof, what right has the court to assume that fact? Does the danger that pickets may resort to intimidation justify an injunction against stationing them for a lawful purpose, and in the absence of any proof of the purpose of placing them can it be assumed to be unlawful? The extreme liability that strikers or their sympathizers will use violence or otherwise break the law does not make it unlawful to strike, and the same reasoning would

require the conclusion that the danger of using pickets unlawfully does not justify an injunction against their employment for a lawful purpose. Excited and uneducated strikers may sometimes be excused for the failure to see clearly and keep within the line that bounds their rightful conduct. But it is the business of the court to discern this line, even if the strikers do not, and to refrain from interfering with any lawful action of the strikers, even if there is danger that unlawful acts may follow.

Citizenship of American Girl Marrying Alien.

The status of an American woman who marries a foreigner and lives with him in his own country is discussed in the "Medico-Legal Journal," vol. 16, pages 125–130. It is there said that "the line of decisions is unbroken that an American woman cannot and does not lose her citizenship by contracting a foreign marriage," and that "the American-born wife of a foreigner not a citizen of the United States, residing abroad with her husband, has the right, under American law, to claim her American citizenship." The article declares further that the United States government, under its Constitution and laws, is bound to protect such American-born women under the Constitution and the act of Congress of July 27, 1868, providing for the interposition of the United States government to demand the release of an American citizen who has been unjustly deprived of liberty by or under the authority of a foreign government, if it appears to be wrongful and in violation of the rights of American citizenship. These statements, which are specifically applied to the case of Mrs. Maybrick, are liable to mislead, as they purport to represent the settled law of the subject. But in reality the law on this matter is by no means clearly settled, and the conclusion announced as to the duty of the United States government to interpose in such cases seems to be plainly wrong.

By "the line of decisions," mentioned by the "Medico-Legal Journal" without citing the cases, is doubtless meant the series of cases which have touched upon the general subject of expatriation. These lean toward the general theory announced in Shanks v. Dupont, 3 Pet. 242, 7 L. ed. 666, that a person cannot throw off allegiance to this government without its consent. In Comitis v. Parkerson, 22 L. R. A. 148, the United States circuit court held that the mere marriage of an American woman to an alien did not, of itself, effect a renunciation of her citizenship, and that such renunciation could not be made without the consent of our government. But it also decided that expatriation could not be effected without removal from this country, and therefore the woman in that case had not lost her citizenship because the alien that she married was a resident of this country and she had continued, and intended always to continue, to reside here. Giving all due force to these decisions, it is at least extremely doubtful if it can be truthfully said that an American woman is entitled to the protection of this government as its citizen against the exercise of jurisdiction over her by a foreign government which claims her as its subject on the ground that she is the wife of one of its subjects and is residing there with him. So long as the authority of the foreign government is not involved our own government might hold that such a woman was entitled to the rights of citizenship here, as, for instance, in respect to the inheritance of property. But when a foreign government claims that a resident American-born wife of one of its subjects has herself become its subject, the United States government must concede the claim, because this government itself makes exactly the same claim with respect to alien-born wives of American citizens. Our government cannot be double-faced in its attitude toward a foreign government on this question. The rule which it invokes in favor of its own jurisdiction over the alien-born wife of a citizen it cannot repudiate when it is invoked by another government. Such an attitude toward another government would be too unreasonable and arrogant to be taken by any honest and self-respecting nation. The United States would tolerate no interference by any foreign country with its jurisdiction to try any naturalized citizen, or the alien-born wife of a citizen, for a crime committed in this country, merely because he or she had invoked the protection of a government to which they had once owed allegiance, and which had never consented to their renunciation of that allegiance. While thus rejecting any interference of foreign governments in such cases, the United States will surely not be itself so impudent as to attempt to interfere with the jurisdiction of another nation over an American-born person who, like Mrs. Maybrick, has chosen to become a citizen of the foreign country, whether by marriage or naturalization, without first

obtaining the consent of our government. The theory that expatriation cannot be accomplished without the consent of the sovereign certainly does not go to the extent of justifying the original sovereign in interfering with the internal administration of justice as against an expatriated person in another country of which he has chosen to become a citizen.

Index to Notes

IN

LAWYERS' REPORTS, ANNOTATED.

Book 44, Parts 2 and 3.

Mentioning only complete notes therein contained, without including mere reference notes to earlier annotations.

The part containing any note indexed will be sent with CASE AND COMMENT for one year for $1.

Among the New Decisions.

Abandonment.

After a judicial separation, although the marriage is not dissolved, it is held, in People, *ex rel.* Commissioners of Public Charities, *v.* Cullen (N. Y.) 44 L. R. A. 420, that the marriage relation is so far terminated or suspended that the husband cannot be guilty of the statutory offense of abandonment or desertion.

Action.

The benefit of a contract by a town with the street-railway company is held, in Adams *v.* Union Railroad Co. (R. I.) 44 L. R. A. 273, to be available to a passenger in an action of trespass for being ejected for nonpayment of fare after tendering the amount allowed by the contract.

Arbitration.

A deposit made to secure an award under an arbitration agreement is held, in Union Ins. Co. *v.* Central Trust Co. (N. Y.) 44 L. R. A. 227, to be forfeited by revocation of the arbitration and subject to payment of the damages allowed by statute for such revocation, although the deposit was made by a third person who committed no breach of the agreement and had no control over the one who did so.

Assignment.

A right of action for personal injuries is held, in North Chicago St. R. Co. v. Ackley (Ill.) 44 L. R. A. 177, to be not assignable, even when the statute has provided for the survival of such an action.

Banks.

A custom of banks to send a check direct to the drawee bank for collection and return is held, in Kershaw *v.* Ladd (Or.) 44 L. R. A. 236, to be not unreasonable, at least as applied to the collection of a plain, unindorsed check.

The failure of the payee of a check promptly to present it for payment is held, in Hamlin *v.* Simpson (Iowa) 44 L. R. A. 397, to effect a release of the maker if he is injured thereby, where the bank subsequently fails, although his general deposit in the bank was overdrawn at the time, if he had a special deposit which he had reasonable grounds to believe would be used to pay the check.

Bills and Notes.

The extent of the recovery of a pledgee of a promissory note as collateral security is held, in Yellowstone Nat. Bank *v.* Gagnon (Mont.) 44 L. R. A. 243, to be the amount of the claim against the pledgeor, at least where the maker has a valid defense as against the pledgeor.

An oral promise by the payee of a note to renew it until such time as the improvement in business will enable the maker to proceed in his business without such assistance is held, in Hall *v.* First Nat. Bank (Mass.) 44 L. R. A. 319, to be invalid and unenforceable, at least in equity.

Bonds.

A recital in a county bond that it was issued under a particular statute, which is in fact unconstitutional, is held, in Wilkes County *v.* Call (N. C.) 44 L. R. A. 252, to estop the holder from contending that the bond was in fact issued under another statute.

Brokers.

A broker is held to be the procuring cause of a sale, in Hoadley *v.* Savings of Bank Danbury (Conn.) 44 L. R. A. 321, when he called a person's attention to the property and gave him information as to how to obtain admission thereto, although, without his knowledge, the owner subsequently took up the negotiation and completed the sale.

Building and Loan Associations.

The right, which some courts have sustained, of a member of a building and loan association to apply stock payments upon a mortgage, in an action by a receiver of the association to foreclose it after the association has become insolvent, is denied in Hale *v.* Cairns (N. D.) 44 L. R. A. 261.

Carriers.

A carrier of live stock which permits salt water to run through pens provided for the stock is held, in Harman *v.* Norfolk & W. R. Co. (Va.) 44 L. R. A. 289, to be liable for injuries caused to the stock by drinking the water while in the pens awaiting shipment.

Discrimination between localities in facilities for transportation is held, in Little Rock & Ft. S. R. Co. *v.* Oppenheimer (Ark.) 44 L. R. A. 353, to be insufficient to make the carrier liable for a penalty under the Arkansas statute prohibiting undue discrimination in facilities for transportation.

The authority of a carrier's agent to make a contract for the delivery of goods at destination at a certain time, which allows the usual period for the trip, is held, in Rudell *v.* Ogdensburg Transit Co. (Mich.) 44 L. R. A. 415, to be within the general authority of agents.

Champerty.

An attorney's contract for compensation contingent upon success is held valid in Croco *v.* Oregon Short Line R. Co. (Utah) 44 L. R. A. 285, but the validity of a stipulation that the attorney would pay the fees and costs of suit thereafter to be commenced is denied, though only a party to it is allowed to question its validity.

Conflict of Laws.

The responsibility of the master for the act of a fellow servant is held, in Chicago & E. I. R. Co. *v.* Rouse (Ill.) 44 L. R. A. 410, to be governed by the law of the place where the cause of action arose, and, if the fellow-servant rule has been abolished there by statute, a liability which exists there can be enforced in another state where the common-law rule still prevails.

Contracts.

A statute curing the defective acknowledgment of a deed of trust and the consequent defect in the record of the deed is held, in Merchants' Bank *v.* Ballou (Va.) 44 L. R. A.

306, to be ineffectual to give it priority over a judgment lien previously acquired, on the ground that to do so would impair the obligation of the contract.

Creditors' Bills.

The right to maintain a creditors' bill against a municipal corporation to reach money due from it to a contractor is denied in Addyston Pipe & Steel Co. v. Chicago (Ill.) 44 L. R. A. 405, following the rule applied in garnishment.

Evidence.

A telegram received from a telegraph operator, purporting to be in reply to one which the recipient had previously deposited with the operator, with charges prepaid and properly addressed, is held, in Western Twine Co. v. Wright (S. D.) 44 L. R. A. 438, to be admissible in evidence against the person by whom it purports to have been sent, without any proof that he actually executed or authorized the despatch, or that it was ever transmitted.

Executions.

The examination on supplementary proceedings of a wife against her husband, with respect to property in her possession, is held, in Frankenthal v. Solomonson (Wash.) 44 L.R.A. 311, to be not "for or against her husband," within the meaning of a statute requiring his consent to her examination for or against him.

Executors and Administrators.

The possession of one who has been admitted to land under a bond for titles is held, in Heard v. Phillips (Ga.) 44 L. R. A. 369, to be adverse in the sense that a sale of the property by an administrator cannot be made pending such possession, although it does not constitute adverse possession for the purpose of prescription.

False Pretenses.

The pretense by a man that he is unmarried, upon which he procures money from a woman on a promise of marriage, is held, in State v. Renick (Or.) 44 L. R. A. 266, insufficient to make him punishable for false pretenses through the use of himself as a false token.

Gift.

[See also TRUSTS.]

A deposit of money in a savings bank in the names of the depositor and a donee, making it payable to the order of either or the survivor, and having the words "Joint owners" stamped on the pass book, is held, in Whalen v. Milholland (Md.) 44 L. R. A. 208, insufficient to make a perfected gift, where the donor keeps possession of the pass book and retains dominion over the funds, with the right to withdraw them at any time.

Highways.

Permission to use a well in a city street, given as part of an electric-light franchise, is held, in Snyder v. Mt. Pulaski (Ill.) 44 L. R. A. 407, to constitute a mere license revocable at the pleasure of the municipality, although the licensee has made expenditures on the faith of it, and would not have accepted the franchise without such permission.

Homestead.

An increase in the value of a homestead is held, in Gowdy v. Johnson (Ky.) 44 L. R. A. 400, to be insufficient to authorize a revaluation and reassignment,—at least if the increase was not rapid or extraordinary and no unreasonable outlay had been made on the premises.

Insurance.

A contract to indemnify a common carrier of passengers against losses occurring from injuries to them is held, in Trenton Pass. R. Co. v. Guarantors' Liability Indemnity Co. (N. J.) 44 L. R. A. 213, to constitute a valid insurance which is not against public policy, although it covers losses resulting from negligence.

The murder of a person whose life is insured, committed by an assignee of the policy, whose claim to it is valid only for reimbursement of premiums paid, is held, in New York Life Ins. Co. v. Davis (Va.) 44 L. R. A. 305, to constitute a forfeiture only of the assignee's part of the insurance.

A life insurance policy taken out by a person on his own life for the purpose of assigning it to another having no insurable interest therein is held, in Steinback v. Diepenbrock (N. Y.) 44 L. R. A. 417, to be invalid. But, if the policy was not taken out with that

of a member of a building and loan association; Merchants' Bank v. Ballou (Va.) 44 L. R. A.

intention, the insured may sell his policy and give a valid title to the assignee.

The creditors of a member of a fraternal beneficiary society are held, in Fisher v. Donovan (Neb.) 44 L. R. A. 383, to have no right to or interest in his certificate either before or after the death of the member, and can have no share in the proceeds thereof.

A waiver of proofs of loss by the insurer's demand for arbitration is held, in Pretzfelder v. Merchants' Ins. Co. (N. C.) 44 L. R. A. 424, to be effectual, notwithstanding the failure of the arbitration because of the inability of the arbitrators to agree.

The cost to the purchaser in possession, and not to the seller, who attempted to retain a secret lien, is held, in Post Printing & Pub. Co. v. Insurance Company of North America (Pa.) 44 L. R. A. 272, to be the value of property insured under a policy stating that the loss is payable to vendor and vendee as their interests may appear, when the seller asserts no claim under its lien.

Judicial Sales.

Land bought by a judgment creditor in good faith on execution sale is held, in Pugh v. Highley (Ind.) 44 L. R. A. 392, to be free from secret equities.

Landlord and Tenant.

The lease of a building which has a door opening at considerable height into space, and unprovided with bars and guards, is held, in Texas Loan Agency v. Fleming (Tex.) 44 L. R. A. 279, not to render the landlord liable to a person injured in consequence of the failure of the lessee or other person, during the lease, to keep the door properly fastened.

Levy and Seizure.

The right of a nonresident to the statutory exemption of household furniture from execution is sustained in Bond v. Martin (Or.) 44 L. R. A. 430.

Master and Servant.

The failure to furnish automatic car couplers in common use for freight cars is held, in Troxler v. Southern R. Co. (N. C.) 44 L. R. A. 313, reaffirming the decision in Greenlee v. Southern R. Co. 41 L. R. A. 399, to constitute negligence *per se*, for which a railroad company is liable to an employee who is injured in attempting to couple cars having skeleton drawheads of unequal height.

The tortious act of a brakeman in throwing coal at a boy on the tender of an engine, by which he knocks him off or frightens him so that he jumps off, causing him to be run over and killed by the engine, is held, in Pierce v. North Carolina R. Co. (N. C.) 44 L. R. A. 316, to render the railroad company liable.

Mortgage.

The right of possession of property sold under foreclosure of a mortgage is held, in Danehower v. Dawson (Ark.) 44 L. R. A. 193, to be in the purchaser during the year allowed by statute for redemption, where the statute transfers the title subject to redemption, and is silent as to the possession.

Mortgages made by deposit of title deeds without writing are held, in Bloomfield State Bank v. Miller (Neb.) 44 L. R. A. 387, to be contrary to the policy of the recording acts which are in force in this country.

Municipal Corporations.

An ordinance granting the exclusive privilege to maintain waterworks in a town for thirty years is held, in Thrift v. Elizabeth City (N. C.) 44 L. R. A. 427, to be in conflict with the constitutional provision against perpetuities and monopolies.

Officers.

The ineligibility of a person who receives a majority of the votes cast for an office is held, in State, *ex rel.* Goodell, v. McGeary (Vt.) 44 L. R. A. 446, to give the minority candidate no right to the office, at least when those who voted for the other person did not know that he was ineligible.

Parent and Child.

A fair contract by which a parent gives the custody of a child to another person, although not binding upon the minor, is held, in Anderson v. Young (S. C.) 44 L. R. A. 277, not to be unlawful or against public policy, if it is not prejudicial to the minor's welfare, which is the principal consideration in determining his custody.

Railroads.

An imperious necessity for an additional crossing of a steam railroad track by a street railway at grade is held necessary in Pennsylvania, and in Chester Traction Co. *v.* Philadelphia, W. & B. R. Co. (Pa.) 44 L. R. A. 269, the court finds that this necessity is not shown by such an increase of traffic that the present crossings are insufficient to enable the cars to be quickly moved.

The obligation of the lessee of a railroad to maintain and operate the railroad during the term of the lease is held, in Southern R. Co. *v.* Franklin & P. R. Co. (Va.) 44 L. R. A. 297, to be a necessary implication of a lease in contemplation of which the road was built, and which provides for the use of the receipts, so far as necessary, to repair the road.

Receivers.

A person employed to cut merchantable timber by a contract calling for a settlement each month and the retention of a certain per cent as a forfeiture for the satisfactory completion of the job is held, in Clark *v.* Renninger (Md.) 44 L. R. A. 413, to be a contractor and not an employee, within the meaning of a statute providing for a receiver of one who fails to pay employees.

Replevin.

An action of replevin for a corpse is held, in Keyes *v.* Konkel (Mich.) 44 L. R. A. 242, to be not maintainable under statutes providing for the replevin of goods and chattels, and providing that judgment for defendant shall be for return of the property or its value.

State University.

The University of California, created by the act of 1868, and continued and declared to be a public trust by the state Constitution of 1879, is held, in *Re* Royer (Cal.) 44 L. R. A. 364, to be an entity capable of taking property by bequest, although the regents are by law made the governing body under a separate incorporation, and the organic act provides in terms for grants and gifts to the regents, without any provision that they may be made to the university.

Statutes.

A statute providing that a trial by jury shall be waived unless certain steps are taken before the trial is held, in Silberman *v.* Hey (Ohio) 44 L. R. A. 264, to be on a subject-matter of general legislation, and therefore invalid when limited in its operation to a single county.

Trespass.

One who draws another person in front of him to serve as a shield to an impending explosion is held, in Laidlaw *v.* Sage (N. Y.) 44 L. R. A. 216, not to be liable for injuries received by the latter from the explosion, unless it is shown that the injuries were caused or increased by such act.

Trial.

The dissent from a sealed verdict by one juror when the jury is polled, after sealing a verdict and separating, made on the ground that he did not agree to the verdict except because he thought he was obliged to, is held, in Kramer *v.* Kister (Pa.) 44 L. R. A. 432, to make a discharge of the jury necessary, and prevent the rendition of any subsequent verdict in the case on that trial.

Trusts.

[See also GIFT.]

A deposit in a savings bank in trust for the owner of the money and another person as joint owners, subject to the order of either, and the balance at the death of either to belong to the survivor, is held, in Milholland *v.* Whalen (Md.) 44 L. R. A. 205, to constitute a valid declaration of trust in favor of the survivor as to the balance of the fund remaining on the death of either, although the settlor retains possession of the bank book.

Writs.

Breaking and entering a dwelling house for the purpose of serving a writ of replevin, after admittance has been demanded and refused, is held, in Kelley *v.* Schuyler (R. I.) 44 L. R. A. 435, to constitute the officer a trespasser.

The fact that a foreign insurance company had authorized service of process to be made on the secretary of state is held, in Connecticut Mutual L. Ins. Co. *v.* Spratley (Tenn.) 44 L. R. A. 442, insufficient to prevent valid service from being made on an agent of the company, who has come into the state on business relating to the settlement of the loss.

negligence *per se*, for which a railroad com- custody.

New Books.

"Review of Recent Legal Decisions Affecting Physicians, Dentists, Druggists, and the Public Health." By W. A. Purrington. (E. B. Treat & Co., New York.) 1 Vol. $5.50.

"Index to Revision of the New Jersey Crimes Act and the Criminal Procedure Act, 1898." By Rex A. Donnelly. (Soney & Sage, Newark, N. J.) 1 Vol. $5.50.

"New Jersey Corporation Laws." Revision of 1896. By Wm. H. Corbin. (Soney & Sage.) Pamphlet, $1. Bound in Art Canvas, $1.50.

"Treadwell's Annotated San Francisco Charter." (Bancroft-Whitney Co., San Francisco, Cal.) 1 Vol. $4.

"Thompson on Corporations." Vol. 7. (Bancroft-Whitney Co.) $6.

"Church's Northwest Digest Supplement of Montana, Oregon, Washington Reports." (Bancroft-Whitney Co.) 1 Vol. $7.50.

"Amendments to Code of North Carolina." Compiled by J. N. Holding. (Southern Law Book Exchange, Raleigh, N. C.) Amendments from 1883-99, $2. For 1899, $1.

"Domestic Relations." By W. C. Rodgers. (T. H. Flood & Co., Chicago, Ill.) 1 Vol. $6.

"Barton's Chancery Practice." Revised and Enlarged. (Bell Book & Stationery Co., Richmond, Va.) 2 Vols. $12.

Recent Articles in Law Journals and Reviews.

"Authority of the Court to Direct Verdict."—49 Central Law Journal, 82.

"The Confirmation of a Tax or Assessment on Real Estate, etc."—49 Central Law Journal, 6.

"Comity in the Enforcement of Rights of Action for Wrongfully Causing Death, Based on Employers' Liability Acts."—49 Central Law Journal, 22.

"Liens of the Receivership of a Business Corporation." Part II.—36 American Law Register, N. S. 383.

"Government Control of Transportation Charges." Part IV.—36 American Law Register, N. S. 355.

"A View of the Parol-Evidence Rule." Part I.—36 American Law Register, N. S. 337.

"Necessity for Special Plea of Payment."—49 Central Law Journal, 45.

"Burden of Proof in Bailment."—49 Central Law Journal, 61.

"The Ancient *Jus Gentium* of the Aryans."—15 Law Quarterly Review, 303.

"What is a Trust?"—15 Law Quarterly Review, 294.

"The Commonwealth of Australia Bill."—15 Law Quarterly Review, 281.

"The Ethics of Advocacy."—15 Law Quarterly Review, 259.

"The Negotiability of Debentures to Bearer and the Growth of the Law Merchant."—15 Law Quarterly Review, 245.

The Humorous Side.

A DARK AND ROLLING EYE.—"It is not necessary for a woman during courtship," says the judge in a recent case, "to inform her intended husband of any device or attachment to improve the work of nature in the construction of her face, form or figure." This was apropos of a charge of deception by wearing glasses to conceal a glass eye.

TRADING ON THEIR NAME.—In a suit for infringement of the whiskey trademark "Knickerbocker," the claim was set up by defendants, named Roosevelt and Schuyler, that, as they belonged to old Dutch families, they were entitled to use the word "Knickerbocker" as their own name. But this contention was disposed of by Judge Bookstaver as having "more of ingenuity and humor than of persuasiveness."

TEACHING GENDER TO A MORMON.—In an eastern law school, when the question arose as to the style of the prosecution in criminal cases, and the variations of "The State," "The People," "The Commonwealth," "Rex," and "Regina," were pointed out, a six-footer from Utah arose and inquired seriously how one could tell when the word should be "Rex" and when it should be "Regina." The hilarity of the class when the professor suggested that this might depend on the sex of the sovereign fully impressed this lesson in gender on the Mormon's mind.

THE BAR TENDERS.—A Michigan correspondent says that at a recent meeting of the State Bar Association in Detroit the members were given a trolley ride around the city, bringing up at the Country Club, and that as they were climbing out of the cars, each wearing a badge labeled

"Michigan
State
Bar
Association,"

the newsboys asked, "What's dem?" and, getting no other information than the badges and the faces of the leaders of the bar, called for three cheers for the "bar tenders."

be waived unless certain steps are taken before ness relating to the settlement of the loss.

"Necessity for Special Plea of Payment."—49 Central Law Journal, 45.

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